IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.658 of 2006
WITH
CIVIL APPLICATION NO.891 OF 2006

Seaqueen Developers. ..Appellant.

V/s.

M/s.Haware Engineers & Builders
Pvt.Ltd. & Ors. ..Respondents.

WITH

APPEAL FROM ORDER ST.NO.21308 OF 2006
WITH
CIVIL APPLICATION ST.NO.21310 OF 2006

Smt.Munira Begum Mohd.Yusuf Mukri @
Munira Khalil ..Appellant.

V/s.

M/s. Haware Engineers & Builders
Pvt.Ltd. & Ors. ..Respondents.

Mr.Vipin Kamdi for appellant in AO No.658/2006.

Mr.R.R.Mishra for appellant in AOST.NO.21308/2006.

Mr.A.K.Abhyankar, Sr.Advocate with Akhilesh Dubey i/b M/s. M.Tripathi & Co. for respondent No.1 in both the appeals.

Mr.Lokesh i/b M/s. G.S.Hegde for respondent No.2 in both the appeals.

CORAM: A.M.KHANWILKAR,J

DATE : JANUARY 24, 2007.

P.C. :

1. Both these appeals with civil applications in the respective appeals will stand disposed of by this

order.

2. These appeals by defendant Nos.2 and 3 respectively take exception to the interim order passed by the Third Joint Civil Judge Senior Division, Thane dated 26th April, 2006 while allowing Exh.5 in S.C.Suit No.35 of 2006. The trial Court has adverted to all the relevant materials on record to record prima facie opinion in favour of the plaintiff. The opinion recorded by the trial Court is a possible view, which can neither be said to be manifestly wrong or perverse.

3. The plaintiff had pressed into service Agreement dated 21st December, 2001 executed between the defendant No.3 and plaintiff, as well as copy of the Development Agreement dated 25/4/2003, Power of Attorney date 25/4/2003, copy of Declaration dated 25/4/2003, copy of Indemnity Bond dated 25/4/2003. All these documents are executed by defendant No.3 in favour of the plaintiff. If the case of the plaintiff, as stated in the plaint were to be accepted as it is, it necessarily follows that the transaction in favour of the plaintiff with regard to the suit property was in earlier point of time; in which case, the defendant No.3 could not have later

on entered into another transaction with the defendant No.2 for the same property. It is matter of record that plaintiff has paid defendant No.3 sum of Rs.5 Lakhs, albeit subsequent payment was not encashed by the defendant No.3.

4. To get over this position, counsel for the defendant No.3 would contend that the Agreement dated 21st December, 2001 was in relation to the property admeasuring 100 sq.mtrs. Prima facie, it is not possible to countenance this submission, if the said agreement is read as a whole. For the time being, this opinion would entitle the plaintiff for grant of interim relief, as has been granted by the lower Court.

5. Counsel for the defendant No.3 would then contend that the documents purportedly executed on 24th April, 2003 pressed into service by the plaintiff were never executed by the plaintiff. For considering this submission, if we turn to the averments in the written statement, there is absolutely no averment to substantiate this position, except vague pleadings in paragraph-1(j) and paragraph-C-17. No material facts are spelt out in the written statement to make good the case of fraud

or forgery of the said documents. Counsel for the plaintiff on the other hand, has rightly drawn my attention to the stand taken by the defendant No.3, which presupposes that the defendant no.3 accepts the factum of execution of questioned documents, but would contend that he did not act upon the same, as the amount received by him was refunded to the plaintiff. Thus understood, it is not possible to countenance the grievance of the defendant No.3 that the documents were not genuine, as is now contended before this Court.

6. Besides, the counsel for the plaintiff has rightly contended that all issues arising from the Agreement dated 25th December, 2001 are already subjudice before the Arbitrator between the plaintiff and defendant No.3. The fact that such proceedings are pending is not in dispute. Even this circumstance, for the time being should be weighed against the defendant No.3.

7. Accordingly, I find no infirmity in the prima facie view taken by the trial Court for granting interim relief in favour of the plaintiff during the pendency of the suit or else the plaintiff would suffer irreparable loss. For the view taken, it was

necessary to pass such order to preserve the property which is subject matter of the suit.

8. Although I am inclined to affirm the order passed by the trial Court, it is however, clarified that the Interim order does not give licence to the plaintiff to apply for permission to the appropriate authority for development of plot in question. This clarification is necessitated in view of the apprehension entertained by the defendant No.3 having regard to the expression "except in favour of plaintiff" in the operative part of the order. As this position is now clarified, no other issue arises for my consideration.

9. In so far as the appeal preferred by the defendant No.2, it is fairly accepted by the counsel for the defendant No.2 that the defendant No.2 should follow the same suit as that of appeal by defendant No.3. Hence, both these appeals are disposed off on the above terms.

10. It is made clear that the trial Court shall decide the suit on its own merits in accordance with the law, uninfluenced by any observations in the impugned order or for that matter the present order.

11. At this stage, counsel for the defendant No.2 submits that atleast hearing of the suit be expedited as the defendant No.2 has already paid substantial amount to defendant No.3. It will be open to the defendant No.2 to move the concerned Court for expediting hearing of the suit. If such application is made, appropriate orders be passed and if the hearing of the suit is expedited, the same be proceeded as High Court expedited case.

12. In view of the above order, civil applications in the respective appeals disposed of accordingly.